Supreme Court, U.S.
FILED
SEP 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-459

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHYLLIS SCHMIDT and EARL SCHMIDT,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH DISTRICT

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QUESTIONS PRESENTED

1. Whether the United States District Court should have treated Respondent's Motion to Dismiss filed pursuant to 28 U.S.C. Section 12(b) as a Motion for Summary Judgment pursuant to 28 U.S.C. Section 56(c) where matters outside the pleadings were submitted with the motion, as well as in response to the motion, and the District Court took the extrinsic evidence into consideration when making its ruling.

2. Is a post office senders receipt showing the date of mailing necessary to constitute the certified or registered mail requirement of 28 U.S.C. Section 2401(b) or will a log entry of a private, profit making mail contractor suffice?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Phyllis Schmidt and Earl Schmidt and the respondent was the United States of America.

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The petitioners Phyllis Schmidt and Earl Schmidt respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on April 25, 1990.

OPINIONS BELOW

The order of the Court of Appeals for the Eighth Circuit denying Petition for Rehearing w/Suggestion for Rehearing En Banc has not been reported as of this date and is reprinted in the Appendix hereto, (A: E p. A-18, infra).

The opinion of the Court of Appeals for the Eighth Circuit is reported at 901 F.2d 680, and is reprinted in the Appendix hereto, (A: D p. A-13, infra).

The memorandum opinion and order of the United States District Court for the District of Nebraska (Cambridge, D.J.) has not been reported. It is reprinted in the Appendix hereto, (A: C p. A-8, infra).

The magistrate's findings and recommendations of the United States District Court for the District of Nebraska (Kopf, M.) has not been reported. It is reprinted in the Appendix hereto, (A: B p. A-3, infra).

The order of the United States District Court for the District of Nebraska (Beam, C.D.J.) has not been reported. It is reprinted in the Appendix hereto, (A: A p. A-1, infra).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1346 (b), 2671-2680 (1982) (FTCA), the petitioners brought this suit in the United States District Court for the District of Nebraska. On December 29, 1988 the District Court entered an order and opinion granting respondent's motion to dismiss for want of subject matter jurisdiction.

On petitioners' appeal, the Eighth Circuit on April 25, 1990, entered a judgment and opinion affirming the District Court's order. Petitioners filed a petition for rehearing with suggestion for rehearing en banc which was denied on June 8, 1990.

The jurisdiction of this court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. Section 2401(b)
Time for commencing action against United States.

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim

accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

29 U.S.C. Section 12(b), (c).
Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings.

(b) How Presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of the summons and complaint, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(c) Motion for Judgment on the Pleadings

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

28 U.S.C. Section 56(c).
Summary Judgment.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On December 20, 1983, Federal air traffic controllers cleared an Ozark Airline flight to land in Sioux Falls, South Dakota. Phyllis Schmidt, a flight attendant on the plane, was injured when the plane struck a snow removal vehicle while landing on the runway.

The Schmidt's filed a timely administrative claim for damages with the Federal Aviation Administration (FAA) on November

1, 1985, alleging that the air traffic controllers were negligent in failing to instruct the driver of the snow blower to leave the runway before they cleared the plane to land.

The FAA issued a final denial of the Schmidt's claim in a letter dated November 19, 1986. The denial letter was receivd by Plaintiff's attorney on November 24, 1986. The Schmidt's filed their FTCA complaint in the district court on May 21, 1987.

The United States moved to dismiss the complaint for lack of subject matter jurisdiction, alleging that the FAA had mailed its final denial letter on November 20, 1986, and thus the Schmidts failed to commence their action within six months of the mailing of the FAA's final denial as required by 28 U.S.C. § 2401(b).[1] Both parties filed written evidence on the jurisdictional question.

The Schmidts opposed the motion to dismiss by alleging that the denial letter was not mailed until November 21, 1986 and the six-month limitation period therefore did not expire until May 21, 1987. The Schmidts further alleged that the mailing process used by the FAA did not constitute certified mail as required by the FTCA and thus the time limitation has yet to commence.

Since the motion of the United States to dismiss was accompanied by extrinsic evidence, the district court judge ordered the motion of the United States be treated as one for summary judgment. (A: A p. A-1, infra). The parties were each given the opportunity to present additional pertinent evidentiary material

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[1] Section 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1982).

relevant to the motion and the case was assigned to a magistrate for findings and recommendations.

After the parties each submitted additional evidentiary material, relevant to the motion, the magistrate found that a material issue of fact, the date of the mailing of the denial letter by the FAA to Plaintiffs' counsel, remained in dispute and thus the magistrate recommended that the motion for summary judgment be denied. (A: B p. A-3, infra).

On December 29, 1988 the district court, after conducting a de novo review of the findings and recommendations of the magistrate, entered its Order and Memorandum granting the motion of the United States to dismiss plaintiffs' complaint. (A: C p. A-8, infra).

Plaintiffs appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals of the Eighth Circuit affirmed the decision of the district court on April 25, 1990. (A: D p. A-13, infra) Petition for rehearing was denied on June 8, 1990. (A: E p. A-18, infra)

The facts considered by the district court revealed that the denial letter was prepared and signed by the FAA on November 19, 1986. The letter was then placed in an envelope with a green return receipt card attached thereto and placed on a shelf in the FAA litigation division office for pickup by a private mail contractor, DDD Co., on Novmber 19 or November 20, 1986. The FAA kept no record of the time or date when the private mail contractor, DDD Co., picked up the denial letter from its office.

The DDD Co. is located in the same building that the FAA occupies in Washington, D.C.. DDD collects the mail of all the federal agencies located in this building, sorts the mail at its office and the mail is then picked up by the United States Postal Service at the DDD's office. A DDD employee logs and assigns

a number to any certified mail from the FAA in a log book provided by the Postal Service, then places the mail in a tray for collection by the Postal Service. DDD does not request a Postal Service receipt for its certified mail. The Postal Service collects such mail twice daily and since no individual receipt is requested, provides none. The postal employee is not asked to and does not sign or postmark stamp the DDD log record of certified mail. Thus, although DDD has a record of receiving the Schmidt's denial letter from the FAA on November 20, 1986, no record shows that the Postal Service actually collected the letter that day.

Barbara Hemby, the DDD employee who logged the Schmidts' denial letter on November 20, stated that after recording the letter in the DDD log book, she would then place the letter in a tray in her office for pick up by the postal service. The tray is provided by the post office, but is not a post office mailbox nor is it locked. She testified that certified mail is treated by the DDD office just like first class mail. (Hemby depo. p. 25, 28). When registered mail is sent by the DDD office, the postman puts a mark stamp on her record of the registered mail and signs the log book provided for registered mail. (Hemby depo. pgs. 19-20). She further testified that the Postal Service should have picked up the letter in its second collection that day, around 5:00 p.m., but noted that she left work at 4:00 p.m., and thus did not see the mail picked up. (Hemby depo. pgs. 25-27).

A.T. Wolder, Director of Marketing and Communications for the Postal Service in St. Louis stated that first class mail sent from Washington, D.C. to St. Louis would arrive in three days. Consequently, the Schmidt's attorney would have received the denial leter on Monday, November 24 whether it was mailed on Thursday, November 20 or Friday, November 21. (A: F & G p. 19,20, infra).

The district court did not treat the motion as a motion for summary judgment and granted the government's motion to dismiss for lack of subject matter jurisdiction, but did not decide whether the denial letter was mailed on November 20 or November 21. The Eighth Circuit Court of Appeals affirmed the district court's decision and ruled that it was "most likely" that the Postal Service received the denial letter on November 20, 1986. 901 F.2d 680 at 683. (A: B p A-13, infra).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE EIGHTH CIRCUIT'S DECISION TO AFFIRM RESPONDENT'S MOTION TO DISMISS DIRECTLY CONFLICTS WITH PRIOR CIRCUIT COURT DECISIONS AND THE INTENT OF 28 U.S.C. § 12(b) and (c).

The timely compliance with 28 U.S.C. § 2401(b) is a jurisdictional prerequisite to the maintenance of a Federal Tort Claim Act (Act) suit. *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983). That section provides that:

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

In the present case, the United States filed motions pursuant to Fed. R. Civ. P. 12(b) challenging the jurisdiction of the district court to proceed with petitioners' complaint without specifying under which section of Rule 12(b) it was proceeding. Since matters outside the pleadings were submitted with the United States' motions to dismiss, the presiding judge ordered that the motion to dismiss be treated as a motion for summary judgment pursuant to 12(b) and permitted the parties to file evidentiary matter relevant to the motion. This was certainly the necessary and effective way to deal with the jurisdictional issue under the Act. *Snyder v. United States,* 717 F.2d 1193 (8th Cir. 1983).

Summary judgment should be granted "only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Summary judgment is an extreme and treacherous device, which should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover under any discernible circumstance. *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The party opposing the summary judgment must be given the benefit of all favorable factual inferences. *Holloway v. Lockhart*, 813 F.2nd 874, 878 (8th Cir. 1987).

The magistrate to whom this case was eventually assigned pursuant to 28 U.S.C. § 636(b)(1)(B) made findings and recommendations on the motion in accordance with the standards appropriate to summary judgment. (A: B p. A-3 infra). The magistrate correctly concluded that a material fact, the date of mailing the denial letter, remained in dispute and since the respondent was unable to prove its allegation that petitioners lacked subject matter jurisdiction, he recommended that the motion to dismiss be denied.

The district court was thereafter in error when it reviewed the matter de novo and improperly shifted the burden on petitioners to disprove respondents inconclusive allegation that petitioners lacked subject matter jurisdiction. The district court failed to follow the accepted standard for determining motions to dismiss regarding jurisdictional issues which require a consideration of matters outside of the pleadings as specifically set forth in *Snyder*. *Snyder*, 717 F.2d at 1194. This motion to dismiss should have properly been treated as a motion for summary judgment under Rule 56(c) and petitioners should have been given the benefit of all favorable factual inferences. The Eighth Circuit's opinion on review was also contrary to the controlling case law on this issue.

Furthermore, The Eighth Circuit Court of Appeals has ruled in *Satz v. ITT Financial Corp.*, 619 F.2d 738, 742 (8th Cir. 1980) that with respect to motions to dismiss, the court must take all

well pleaded allegations in the complaint as true and that a complaint should not be dismissed unless it appears beyond a doubt that the plaintiff cannot prove *any* facts in support of their claim to entitle them to relief. That was a case where the district court treated a motion to dismiss as a motion for summary judgment for lack of subject matter jurisdiction. This Court determined that "All doubts on jurisdictional points must be resolved in favor of plenary trial rather than dismissal at the pretrial stage". *Satz,* at 742 citing *Miller v. Central Chinchilla Group, Inc.,* 494 F.2d 414, 417 (8th Cir. 1974).

If the letter denying petitioners' claims was mailed by the FAA on November 21, 1986, the date petitioners alleged in their complaint that the respondent declined to settle their claim, their complaint filed on May 21, 1987 would be considered timely. *McDuffie v. United States,* 769 F.2d 492 (8th Cir. 1985). Regardless whether the facts concerning the date of mailing the denial letter by the FAA to petitioners' attorney are viewed in a light most favorable to petitioners, the weight of the evidence supports the conclusion that the letter was mailed on November 21, 1986. The evidence shows that:

(1) The FAA has no senders' receipt from the U.S. Postal Service as proof of mailing the denial letter. (Hemby depo. pgs. 27-29, Leemon depo. pgs. 9-10, 20).

(2) The letter was received by DDD on their last mail pick up late in the afternoon on November 20, 1986. (Hemby depo. p. 23).

(3) The log of DDD maintained by Barbara Hemby only proves that the letter was received by DDD on November 20, 1986 and contains no U.S. post office date stamp.

(4) The log entry by Hemby for DDD was made at the time the letter was received in the DDD mail room at Hemby's desk but before the letter was supposed to be taken to the mail tray. The entry is not evidence the letter was in fact thereafter placed in the tray on November 20, 1986.

(5) Hemby left work on November 20, 1986 before the post office normally arrived for the last scheduled mail pick up so she did not see a postal employee pick up this particular letter and has no personal knowledge that the last mail pick up was made that day.

(6) The DDD office closed at 5:00 p.m. on November 20, 1986 and no mail could have been picked up from the DDD office by post office employees after 5:00 p.m. according to Hemby. (Hemby depo. p. 31)

(7) The affidavits of A.T. Wolder established that November 24, 1986, the date petitioners' attorney received the FAA letter, is consistent with the evidence that the letter was mailed on November 21, 1986. (A: 39-40)

The district court made no factual finding that the denial letter was mailed on November 20, 1986 and that petitioners' claims were barred by the limitations imposed by 28 U.S.C. § 2401(b). The district court, like the magistrate, found that it was unable to determine whether it was mailed November 21, 1986. Since this material fact necessary for the respondent to prove its allegation that petitioners lacked subject matter jurisdiction remained in dispute, the motion to dismiss of the respondent should have been overruled by the court. Thus, the Eighth Circuit's opinion affirming the district court's ruling is contrary to the intent of 28 U.S.C. § 12(b) and (c), and to other circuit court decisions on this issue.

II

THIS DECISION IS A CASE OF FIRST IMPRESSION LEGALLY DEFINING THE ELEMENTS THAT CONSTITUTE "CERTIFIED MAIL" AS USED IN 28 U.S.C. § 2401(b) AND BY NARROWLY CONSTRUING SAME, CONFLICTS WITH OTHER SIMILAR STATUTORY INTERPRETATIONS.

The motion to dismiss of the respondent is based on its contention that the petitioners' claim is time barred by 28 U.S.C. § 2401(b). That section provides, in part, that a tort claim against the United States shall be forever barred unless action is begun within six months after the date of mailing, *by certified or registered mail,* of notice of final denial of the claim by the agency to which it was presented. (Emphasis added) The statute is specific in the manner in which the denial letter must be mailed by the federal agency — certified or registered mail.

Since the statute commences to run once the denial letter is mailed, the exact date of that mailing and not the date of the receipt of the letter is the critical date. Petitioners have found no cases under the Act which have addressed the question of what specifically constitutes certified or registered mailing. A definition of certified mail is found in the postal service rules and regulations. Certified mail service "is a service that provides a mailing receipt to the sender and a record of delivery at the office of address". 39 CFR Ch. III, Pt. 3001, Subpt. C, App. A, Sec. 5.01.

The Domestic Mail Manual, a manual which contains the regulations of the U.S. Postal Service governing its domestic mail services, also contains a description of certified mail service. There it is said, in part, that "certified mail service provides the sender with a mailing receipt and a record of delivery at the office of address." Domestic Mail Manual, Sec. 912.1(a). Registered mail is similarly described in the Domestic Mail Manual as incorporating a system of receipts to monitor the

mail's movement from the point of acceptance to delivery. Domestic Mail Manual, Sec. 911.11.

A similar situation to this case was presented in the case of *Lindemood v. Commissioner of Internal Revenue,* 566 F.2d 646 (9th Cir. 1977). In that, a tax court case, the taxpayers argued they sent timely petitions for redetermination of deficiencies to the Internal Revenue Service in an envelope designated as certified mail which was stamped with sufficient postage by a private postage meter. The United States Postal Service did not stamp or mark either of the envelopes in which the petitions were mailed or either of the sender's receipts for certified mailing. The only postmark date on the envelopes was made by the taxpayers own private postage meter. The taxpayers relied, in part, on a federal regulation applicable in tax cases that provided that "if the document is sent by U.S. certified mail and the sender's receipt is postmarked by the postal employee to whom such document is presented, the date of the U.S. postmark on such receipt shall be treated as the postmark date of the document." *Lindemood,* at 649. The court held that since the sender's receipt for the letters were not marked by a postal employee, they did not bring themselves within the certified mail regulation. *Lindemood,* 566 F.2d at 649.

The FAA mailing of the denial letter under the facts of this case was not a mailing by certified or registered mail. The FAA attached the green return receipt card to the denial letter but that card merely monitored the acceptance of the letter by the addressee. Neither the FAA or DDD obtained a stamped sender's receipt from either the Post Office or the postman. The entries made in the DDD log on November 20, 1986 are analogous to the private postage meter marks the taxpayers in *Lindemood* placed on their envelopes. The entries provide no independent proof of mailing without a postmarked receipt by a postal employee. Such a receipt would show the acceptance date by the postal service — the date of mailing. The important question concerning the commencement of the six month limita-

tion period could have thereby been resolved with certainty. See Collins, *The Validity of Postmarks,* 47 AFAJ 371, 374 (1961).

Moreover, the procedures employed by the FAA in this matter were questionable in view of the importance of establishing the precise mailing date. The FAA has no record of its own of the mailing of the denial letter but rather has left this important duty to a third party. DDD, through its private log, has merely maintained a record of the receipt of the denial letter from the FAA and has no documentary evidence of its mailing. The FAA's private mailing practices, although presumably efficient for its voluminous daily needs, simply was not sufficient to comply with the special requirements of 28 U.S.C. § 2401(b) which is intended to ensure verification of the exact date of mailing of the statutory denial letter.

This is not the first case in which the method of mailing denial letters by the FAA has been questioned. On December 5, 1985 the FAA mailed a claim denial letter to the attorney for Jerome M. Johnson by regular mail and not by certified or registered mail as § 2401(b) required. *Johnson v. United States,* 652 F.Supp. 407 (E.D. Va. 1987). The United States in that case moved to dismiss Johnson's complaint which was filed on October 5, 1986, arguing that the defect in mailing was harmless because Johnson's attorney actually received the letter by December 12, 1985. The court agreed with Johnson's contention that the failure of the FAA to mail the letter by "certified or registered mail" barred the United States from asserting the six month period of limitations. The court stated that:

> "The requirement of registered or certified mail provides certainty and avoids disputes over whether plaintiff actually received the final denial. Congress could have written the statute to provide an exemption for cases in which there was actual receipt."

Johnson, at 409.

It has been said that 28 U.S.C. § 2401(b) must be strictly construed and it not to be extended by equitable considerations. *Childers v. United States,* 442 F.2d 1299 (5th Cir. 1971). That strict construction of the statute should apply equally to the duties of the government under the law as well as the duties of the plaintiffs. The Act does waive the immunity of the United States and, in construing the statute of limitations, a court should not narrow the waiver that Congress intended. *United States v. Kubrick,* 36 L. Ed.2d 16 (1979).

Congress specified in 28 U.S.C. § 2401(b) two methods of mailing denial letters, each of which would have provided the FAA with proof of the date of mailing through a post office employee. It must be assumed that Congress intended that these methods of receipts for sending and accepting the denial letters would resolve disputes over such mailing and avoid litigation that might follow. This court should strictly construe § 2401(b) and find the denial letter mailed to the petitioners by the FAA was not mailed in compliance with the statute and was ineffective to trigger the running of the statute of limitations against petitioners.

There are two time restrictions on the filing of tort claims against the United States under the Act's statute of limitations in 28 U.S.C. § 2401(b). First, a claim must be presented to the appropriate federal agency within two years of the date of its accrual. Second, a plaintiff must file legal action, if he chooses to do so, no more than six months after the federal agency mails its notice of final denial of the claim by certified or registered mail.

Petitioners in this case satisfied the first of these requirements when they filed their Federal Tort claim with the FAA on November 1, 1985. This filing tolled the statute of limitations in this case until the petitioners' claim was finally denied.

If, however, the notice of denial mailed by the FAA to petitioners' attorney did not constitute a notice of final denial pursuant to 28 U.S.C. § 2401(b), the six months limitation period

imposed upon petitioners did not begin to run in this case regardless of whether the denial was mailed on November 20, 1986 or November 21, 1986. Title 28 U.S.C. § 2675(a) provides, in part:

> "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section."

The courts have held that 28 U.S.C. § 2675(a) and the statute of limitations of 28 U.S.C. § 2401(b) are to be read together. *Leonhard v. United States,* 633 F.2d 599, 624 (2nd Cir. 1980), *Chambly v. Lindy,* 601 F. Supp. 959, 963 (W.D. Pa. 1985).

It is petitioners' position, heretofore explained, that the mailing by the FAA of the denial letter to petitioners' attorney did not constitute mailing by certified mail within the requirements of § 2401(b) and the intent and purpose of that limitations statute. Since the FAA failed to deny petitioners' administrative claim in the manner required by statute, by mailing the denial by certified or registered mail, petitioners were only obligated to comply with the two year statute of limitations requiring presentment of their claim to the appropriate federal agency within two years of the date of its accrual. *Johnson v. United States,* 652 F. Supp. 407, 409 (E.D. Va. 1987).

The case of *Miller v. United States,* 741 F.2d 148 (7th Cir. 1984), presented a situation similar to the case at bar. The denial letter sent by the federal agency to the plaintiffs in that case did not deny their claim on its face and the agency, the postal service, did not send the letter by certified or registered mail. The court in that case determined that pursuant to 28 U.S.C. § 2675(a) if the federal agency fails to finally dispose of a properly made claim within six months of its presentation, the claimant had the option to treat the inaction as a constructive final denial. Since the postal service had not finally denied the claim by the denial letter which they sent, the petitioners could

exercise that option at any reasonable time by thereafter filing suit. *Miller v. United States,* at 151.

In the case at bar, the denial letter mailed to petitioners' attorney by the FAA did not constitute a final denial by the agency pursuant to the statute. Under 28 U.S.C. § 2675(a) the petitioners had the option of treating the failure of the agency to finally deny as a constructive final denial and the filing of their complaint on May 21, 1987 should be so considered. *Chambly v. Lindy, id.* 963-64, *Boyd v. United States,* 482 F. Supp. 1126, 1129-30 (W.D. Pa. 1980), *Mack v. United States Postal Service,* 414 F. Supp. 504, 507-8 (E.D. Mich. 1976).

The motion to dismiss of the respondent should have been denied since the mailing of the denial letter to petitioners' attorney by the FAA did not conform to the strict requirements of 28 U.S.C. § 2401(b) and did not constitute a final denial of petitioners' claim. Therefore, since more than six months had elapsed since the petitioners' filed their administrative claim, petitioners had the right to consider the FAA's inaction as a constructive final denial and thereafter file suit in this matter in a timely manner.

CONCLUSION

For these various reasons, petitioners respectfully submit that these issues should be addressed through the acceptance of this application for certiorari. If petitioners are correct in urging that the Eighth Circuit should have overruled the district court's decision and treated respondent's motion to dismiss pursuant to 28 U.S.C. § 12(b) as a motion for summary judgment under the standards of 28 U.S.C. § 56(c), and/or, that the respondent did not comply with the specified mailing requirements of 28 U.S.C. § 2401(b), the matter should be remanded to the District Court for appropriate disposition on the merits.

Respectfully submitted,

John P. Madigan, Jr.
818 Olive Street, Suite 1050
St. Louis, Missouri 63101
(314) 231-2210

Counsel of Record/
Counsel for Petitioners

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 87-0-347

PHYLLIS SCHMIDT, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

(Filed: September 15, 1987)

This matter is before the Court upon the defendant's motion (filing 5) to dismiss for lack of jurisdiction. Defendant asserts that plaintiffs' complaint was filed longer than six months after the date of mailing of the final denial of plaintiffs' claim by the Federal Aviation Administration, as required by 28 U.S.C. § 2401(b). There is some dispute between the parties as to when the final denial notice was actually mailed. Therefore, the Court finds that this motion shall be treated as one for summary judgment pursuant to Fed. R. Civ. P. 12(b), and the parties shall be given an opportunity to present affidavits and other pertinent evidentiary materials relevant to the motion.

Accordingly,

IT IS ORDERED as follows:

1. That defendant's motion (filing 5) to dismiss shall be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b).

2. Defendant shall submit such affidavits and other evidentiary material it deems relevant, together with a supplemental brief in support of its motion, if necessary, within twenty (20) days from the date of this order.

3. Plaintiffs shall thereafter sumit such affidavits and other evidentiary material they deem relevant, together with a responsive supplemental brief, if necessary, with ten (10) days following service of defendant's supplemental brief and evidentairy material.

DATED this 15th day of September, 1987.

BY THE COURT:

/s/ C. Arlen Beam, Chief Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 87-0-347

PHYLLIS SCHMIDT and EARL SCHMIDT,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

(Filed: January 26, 1988)

This case is before the Magistrate pursuant to 28 U.S.C. § 636 for consideration of the defendant's Motion to Dismiss (filings 5 and 10) pursuant to Fed. R. Civ. P. 12(b)(1), which Motion is to be treated as a Motion for Summary Judgment, pursuant to the Order of then Chief Judge C. Arlen Beam (filing 11). Plaintiffs have submitted a brief, a reply brief, affidavits and two depositions in support of their position; defendant has submitted a brief, two response briefs and affidavits in support of its position.

As Judge Beam's Order (filing 11) appears to regard the jurisdictional determination of whether plaintiffs' action was begun within six months after the date of mailing, by certified mail, of notice of final denial of the claim by the Federal Aviation Administration ("FAA") as intertwined with the merits of plaintiffs' claim(s), defendant's Motion should be decided in accordance with the standards appropriate to summary judgment. *Wheeler v. Hurdman,* 825 F.2d 257, 259 (10th Cir. 1987), *cert. denied,* 56 U.S.L.W. 3414 (1987).

Summary judgment should be granted "only if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is an extreme and treacherous device, which should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy, and unless the other party is not entitled to recover any discernible circumstance. *Vette Co. v. Aetna Casualty & Surety Co.,* 612 F.2d 1076, 1077 (8th Cir. 1980). In passing upon a motion for summary judgment, the district court must view the facts in light most favorable to the party opposing the motion. *Id.* Even if the district court is convinced that the moving party is entitled to judgment, the exercise of sound judicial discretion may dictate that the motion should be denied, in order that the case can be fully developed at trial. *McClain v. Meier,* 612 F.2d 349, 356 (8th Cir. 1979).

In the present action, plaintiffs' claim arises out an aircraft accident which occurred on December 20, 1983. Plaintiffs submitted an administrative claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, to the Federal Aviation Administration ("FAA"). This administrative claim was denied by the FAA by a letter dated November 19, 1986. The date of the mailing of the denial letter is in dispute. Plaintiffs filed this action on May 21, 1987. Defendant, in its Motion to Dismiss pursuant to Rule 12(b)(1), which Motion was later ordered to be treated as one for summary judgment, asserts that plaintiffs' claim is barred, as defendant states that plaintiffs failed, pursuant to 28 U.S.C. § 2401(b), to file their action within six months after the date of mailing by certified mail of the FAA's denial letter. Defendants assert that the letter was mailed on Thursday, November 20, 1986 (filing 10). Plaintiffs, however, maintain that the letter was mailed after that date.

The facts leading up to the mailing of the letter are as follows. The letter was signed on November 19, 1986, and then placed in an envelope with a green return receipt card attached. The letter

was then placed on a shelf in the FAA office for pickup by a mail contractor, DDD Company on November 19 or 20, 1986. DDD Company employees then sort out the mail from the federal agencies. If a green card is attached to a piece of mail, as was the case here, a DDD Company employee assigns an article number to that green card, logging the article by name and address in a DDD log book, which normally serves as a receipt to the sender. The United States Postal Service employee normally does not sign, postmark or stamp the DDD log book when the mail is picked up, or "mailed."

Section 2401(b) provides: "A tort claim against the United States shall be forever barred . . . unless action is begun within six months of after the date of mailing, by certified . . . mail, of notice of final denial of the claim by the agency to which it was presented." In noting an existing split among the courts with regard to the beginning of the six-month period, the Eighth Circuit Court of Appeals has determined that the traditional method of calculating the six-month period relevant to section 2401(b) should be used, *McDuffee v. United States,* 769 F.2d 492, 493-94 (8th Cir. 1985); therefore, the six-month period in the instant case would begin on the day of mailing rather than on the day following the mailing. As plaintiffs filed their action on May 21, 1987, it therefore becomes critical whether the FAA's denial letter was mailed on Thursday, November 20, 1986, as defendant asserts (filing 10), or on Friday, November 21, 1986, as plaintiffs assert. If the letter were found to have been mailed on November 20, 1986, plaintiffs' action would then be barred in accordance with section 2401(b).

The Magistrate finds that a genuine issue as to a material fact exists with regard to the determination of the date of the mailing of the denial letter. First, in a deposition of Ms. Barbara Ann Hemby, assistant supervisor for the DDD Company, the company which contracts with the FAA for mail pickup and delivery, the following exchange occurred:

Q Do [the United States Postal workers] ever come by [the office of Ms. Hemby to pick up mail, including FAA mail] between 1 and 2 o'clock and not come back at 4:15?

A. *No. They get fired.*

(Hemby Deposition, 31:5-7 (emphasis added)). The Magistrate finds, despite other assurances of Ms. Hemby that the United States postal workers "always" came by to pick up mail at 4:15 (Hemby Deposition, 30:5-22, 31:1), that the exchange noted above, together with the uncertainty of events surrounding the mail pickup, indicates that it is possible that a 4:15 pickup *might* have been missed on November 20, 1986.

Second, Mr. A.T. Wolder states in an affidavit that the United States postal delivery standard for mail delivery between Washington, D.C. and St. Louis, the route of the letter in question, is three days (filing 17). Furthermore, Mr. Wolder stated the following in his affidavit (Defendant's Response to Plaintiff's Brief in Opposition [hereinafter Defendant's Response], attachment):

> . . . [D]elivery [of mail from Washington, D.C. to St. Louis] is normally completed within 3 days following the day of deposit with the United States Postal Service. For example, a letter deposited on Monday would normally be delivered by Thursday.
>
> 3. If a certified letter is mailed to a person's street address (as opposed to a post office box) on a Thursday, and there is a 3 day delivery standard, then the letter would normally be delivered by the following Monday.
>
> 4. Likewise, if a certified letter is mailed to a person's street address (as opposed to a post office box) on a Friday, and there is a 3 day delivery standard, then the leeter would also normally be delivered by the following Monday.

(Defendant's Response, attachment). In light of the above statements in Mr. Wolder's affidavits, therefore, and as the denial letter was received on Monday, November 24, 1986, it is *possible* that the letter could have been mailed on Friday, November 21, 1986, in which case plaintiffs' action would have been timely filed.

Therefore, in light of the standards described earlier in these Findings and Recommendations, and upon reviewing the record in this case, the Magistrate finds that a material fact, the date of the mailing of the denial letter, remains in dispute and therefore recommends that defendant's Motion be denied.

IT IS THEREFORE RECOMMENDED to the District Judge to whom this case is assigned that the Motion for Summary Judgment (filings 5 and 10) should be denied.

DATED this 26th day of January, 1988.

/s/ Richard G. Kopf
United States Magistrate

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 87-0-347

PHYLLIS SCHMIDT and EARL SCHMIDT,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION

(Filed: Dec. 29, 1988)

This matter is before the Court upon defendant's objections (Filing No. 22) to the magistrate's findings and recommendations (Filing No. 20). Pursuant to 28 U.S.C. § 636(b)(1)(B), this Court has conducted a *de novo* review of those portions of the findings and recommendations to which defendant has objected.

Plaintiffs have brought this action seeking the recovery of monetary damages under the Federal Tort Claims Act (Act) 28 U.S.C. §§ 1346(b) and 2671. Previously, plaintiffs had pursued an administrative claim with the Federal Aviation Administration (FAA). On November 24, 1986, plaintiffs' attorney received a letter notifying them that the administrative claim had been denied. On May 21, 1987, plaintiffs filed this action.

Defendant, United States, has filed a motion to dismiss and an amended motion to dismiss (Filing Nos. 5 and 10) claiming that plaintiffs have failed to timely file their complaint. The Court issued an order (Filing No. 11) stating that these motions would be treated as a motion for summary judgment so that the parties could submit evidence relevant to the motions. Subsequently, the Court issued a memorandum (Filing No. 27) stating

that although summary judgment has often been an effective way to deal with jurisdictional matters, it was not appropriate in this case. The Court further stated therein that it should be clearly understood that the burden is upon plaintiffs to show that they have complied with 28 U.S.C. § 2401(b), which would establish jurisdiction in this matter. What the Court has effectively done is allow the parties to submit evidence in order that the Court may make a proper determination as to whether it has jurisdiction in this matter. This is similar to the handling of a summary judgment motion pursuant to Fed. R. Civ. P. 56, and it is certainly proper and necessary in this case. *See Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986).

The central issue in this case is whether plaintiffs filed this lawsuit within six months of the mailing of the final denial of their administrative claim by the FAA. This time limitation must be complied with in order for the Court to have subject matter jurisdiction. 28 U.S.C. § 2401(b). The evidence which has been submitted indicates that the letter which was sent to plaintiffs, and which informed plaintiffs that their administrative claim had been denied, was dated November 19, 1986. However, it is not clear which date the letter was actually mailed. As a result, determining when the six-month period began to run is made difficult.

The FAA employed a private mail service, DDD Company, (DDD), to pick up its mail, sort it and deliver it to the post office. The log books of DDD indicate that the denial letter was picked up on November 20, 1986, and that it had a green receipt card attached. The receipt card indicates that the letter was to be sent by certified mail, as was required by 28 U.S.C.

§ 2401(b).[1] Ultimately, on November 24, 1986, the receipt was signed by plaintiffs' attorney when the letter was delivered.

The letter could not be considered "mailed" until it had been properly addressed and deposited in a post office box or left at a United States Post Office. *Davis v. Pennsylvania Railroad*, 7 FRD 622, 623 (N.D. Ohio 1947). *See also Satterfield v. Celebrezze*, 244 F. Supp. 190 (W.D.S.C. 1965).[2] However, when the mailing of the letter actually occurred is not clear. The evidence indicates that it was either November 20, or November 21, depending upon when the mail was picked up from DDD by the post office. Plaintiffs assert that it is the responsibility of the defendant to know which date is correct, and that because defendant does not know, plaintiffs should not be penalized.

This assertion sidesteps the Court's earlier order. When a defendant challenges jurisdiction, the burden is upon the plaintiff of establishing the jurisdictional facts. *Western Nebraska Resources v. Wyoming Fuel Co.*, 641 F. Supp. (D. Neb. 1986). Plaintiffs have simply failed to establish these facts. Furthermore, the Court knows that the plaintiffs were in possession of the letter, therefore, they were clearly aware that the letter was

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[1] The Court hereby finds that said letter was sent by certified mail. There is no evidence which suggests otherwise. Plaintiffs claim that the FAA failed to comply with the statutory mailing requirements, specifically, 39 U.S.C. § 5012, is non-persuasive. In fact, it appears that plaintiffs, by referencing § 5012, are relying upon a portion of Title 39 which no longer exists. Title 39 was revised by Congress in 1970. *See* Postal Reorganization Act, Pub. L. 91-375, § 2, 84 Stat. 719 (1970).

[2] The Court hereby rejects the holding in *Texas Casualty Insurance Company v. McDonald*, 269 S.W.2d 456 (Tex. Civ. App. 1954), wherein it was held that a mailing occurs when a letter is placed in the custody of an officer of the company who was charged with the duty of forwarding the mail. This decision appears to set forth a minority position on an issue where there is admittedly little existing authority.

dated November 19, 1986. In spite of this knowledge, plaintiffs chose to wait until May 21, 1987, to file this action.

Therefore, the Court finds that defendant's motion to dismiss (Filing Nos. 5 and 10) should be granted and this action dismissed. A separate order shall be entered this date in accordance with this memorandum opinion.

Dated this 29th day of December, 1988.

BY THE COURT:

/s/ WILLIAM G. CAMBRIDGE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 87-0-347

PHYLLIS SCHMIDT and EARL SCHMIDT,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

(Filed: Dec. 29, 1988)

In accordance with the memorandum opinion entered this date,

IT IS SO ORDERED:

(1) The Court declines to adopt or confirm the findings and recommendations of the magistrate; and

(2) Defendant's motion to dismiss is granted and this action is dismissed.

Dated this 29th day of December, 1988.

BY THE COURT:

/s/ WILLIAM G. CAMBRIDGE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1328

Phyllis Schmidt and Earl Schmidt,
Appellants,

v.

United States of America,
Appellee.

Appeal From the United States District Court
for the District of Nebraska.

Submitted: February 14, 1990

Filed: April 25, 1990

Before BOWMAN, Circuit Judge; HEANEY, Senior Circuit Judge, and HUNTER,* District Judge.

HEANEY, Senior Circuit Judge.

Phyllis and Earl Schmidt appeal from the order of the district court dismissing their complaint under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982) (FTCA), for lack of subject matter jurisdiction. We affirm.

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* The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri, sitting by designation.

BACKGROUND

On December 20, 1983, air traffic controllers cleared an Ozark Airline plane to land in Sioux Falls, South Dakota. Phyllis Schmidt, a flight attendant on the plane, was injured when the plane struck a snow removal vehicle after landing on the runway. The Schmidts filed an administrative claim for damages with the Federal Aviation Administration (FAA) on November 1, 1985, alleging that the air traffic controllers were negligent in failing to instruct the driver of the snowblower to leave the runway before they cleared the plane to land there.

The FAA issued a final denial of the Schmidts' claim in a letter dated November 19, 1986. The Schmidts' attorney received the letter on November 24, 1986. The Schmidts filed their FTCA complaint in the district court on May 21, 1987.

The United States moved to dismiss the complaint for lack of subject matter jurisdiction, alleging that because the FAA had mailed its final denial on November 20, 1986, the Schmidts failed to commence their action within six months of the mailing of the FAA's final denial as required by 28 U.S.C. § 2401(b).[1] Both parties filed written evidence on the jurisdictional question.

The Schmidts opposed the motion to dismiss by alleging that the denial letter was not mailed until November 12, 1986 and the six-month limitation period therefore did not expire until May 21, 1987. Neither the government nor the Schmidts could prove

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[1] Section 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1982).

precisely when the denial letter was mailed, because the FAA gives its outgoing mail to a private mail contractor, DDD Co., from whom the United States Postal Service collects it. A DDD employee logs and assigns a number to any certified mail from the FAA in a logbook provided by the Postal Service, then places the mail in a tray for collection by the Postal Service. The Postal Service collects such mail twice daily, but provides no receipt for certified mail. Thus, although DDD has a record of receiving the Schmidts' denial letter from the FAA on November 20, 1986, no record shows that the Postal Service actually collected the letter that day.

Barbara Hemby, the DDD assistant supervisor who logged the Schmidts' denial letter on November 20, stated in an affidavit that the Postal Service should have picked up the letter in its second collection day, around 5:00 p.m., but noted that she left work at 4:00 p.m. Hemby stated that the Postal Service had never failed to make the 5:00 p.m. pickup.

Steve Croston, the Postal Service's supervisor of government mail for Washington, D.C., stated that if the postal employee responsible for making the 5:00 p.m. pickup from DDD had failed to do so, he would have filed an irregularity report explaining the reason for the failure. No such report was filed. Croston also stated that if a scheduled pickup is not made, postal employees can make arrangements to enter government buildings after hours to collect mail, and that no mail ready for collection would have been left uncollected overnight.

A. T. Wolder, Director of Marketing and Communications for the Postal Service in St. Louis stated that first class mail sent from Washington, D.C. to St. Louis would arrive in three days. Consequently, the Schmidts' attorney would have received the denial letter on Monday, November 24 whether it was mailed on Thursday, November 20 or Friday, November 21.

The district court granted the government's motion to dismiss for lack of subject matter jurisdiction, but did not decide

whether the denial letter was mailed on November 20 or November 21. The court concluded that the Schmidts bore the burden of establishing jurisdictional facts and that they had failed to do so. The court also noted that because the Schmidts knew the letter was dated November 19, 1986, they should not have waited until May 21, 1987 to file their complaint.

DISCUSSION

On appeal, the Schmidts argue that the district court erred in dismissing their complaint because the date on which the denial letter was mailed constitutes a disputed issue of material fact. They also argue that the FAA failed to send the denial letter by certified or registered mail, as the statute requires, and that the denial letter therefore did not start the six-month limitation to run. Neither of those contentions has merit.

Institution of an action against the United States within the six-month limitations period is a jurisdictional requirement. *See* 28 U.S.C. § 2401(b); *Powers v. United States*, 390 F.2d 602, 604 (9th Cir. 1968). The district court correctly noted that the Schmidts bore the burden of establishing subject matter jurisdiction once the Government challenged it. *See Butts Feed Lots, Inc. v. United States*, 690 F.2d 669, 670 (8th Cir. 1982) (burden of establishing jurisdiction lies with plaintiff). The existence of subject matter jurisdiction is a question of law that the court of appeals reviews de novo. *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1032 (9th Cir. 1987); *Hilliard v. United States Postal Serv.*, 814 F.2d 325, 326 (6th Cir. 1987).

Our review of the evidence suggests that the Postal Service most likely did receive the denial letter on November 20, 1986, as the Government contends. In any case, the evidence fails to establish the Schmidts' contention that the denial letter was not mailed until November 21, 1990. Consequently, the Schmidts have failed to carry their burden of establishing the facts to support subject matter jurisdiction.

The Schmidts alternatively claim that because the FAA or its agent, DDD, failed to get a sender's receipt from the Postal Service, it did not comply with the statute's requirement that the denial letter be sent by certified mail. The Schmidts support this argument with citations to several standard dictionaries defining "certified mail" as mail for which the sender gets a receipt. Postal regulations also define "certified mail service" as providing a receipt to the sender. 39 C.F.R. ch. III, pt. 3001, subpt. C., app. A, § 5.01 (1989). The regulations do not require, however, that the sender's receipt indicate the time of mailing. *See id.* The Postal Service will indicate the time of mailing on the sender's receipt only if the sender requests it. *Id.* § 5.021. For customers who send large quantities of certified mail, the Postal Service provides logbooks, such as that used by DDD, in which the sender indicates the number and date of each article sent by certified mail. In such a case, the pages of the book become the sender's receipts. *Domestic Mail Manual* § 912.4.45, at 486 (Dec. 20, 1987).[2] Consequently, DDD's certified mail procedure satisfied the statutory requirement of 28 U.S.C. § 2401(b) and commenced the running of the six-month limitation period. Because the Schmidts did not file their FTCA claim until May 21, 1987, the claim was untimely and the district court had no jurisdiction to hear it.

CONCLUSION

We affirm the order of the district court dismissing the Schmidts' FTCA complaint for lack of subject matter jurisdiction.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[2] The United States Postal Service has incorporated the *Domestic Mail Manual* by reference into its regulations. *See* 39 C.F.R. § 111.1 (1989).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1328NE

Phyllis Schmidt, et al.,
Appellants,

v.

United States of America,
Appellee.

Order Denying Petition for Rehearing
with Suggestion for Rehearing En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 8, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

AFFIDAVIT OF A. T. WOLDER

I, A. T. Wolder, having first been duly sworn, depose and say the following:

1. I am employed by the United States Postal Service, in St. Louis, Missouri in the position of Director of Marketing and Communications.

2. I have personal knowledge of the postal service first class mail delivery standards for the month of November, 1986.

3. The United States Postal Service delivery standard for first class mail which was mailed from Washington, D.C. to St. Louis, Missouri in November, 1986 was three (3) days. This means delivery is normally completed within three (3) days of mailing.

/s/ A. T. Wolder

Subscribed and sworn to before me a notary public this 10th day of December, 1987.

/s/ James E. Heckel
Notary Public

My Commission Expires: March 2, 1991

APPENDIX G

AFFIDAVIT OF A. T. WOLDER

I, A. T. Wolder, having been duly sworn, depose and say the following:

1. I am the same person who signed an affidavit on December 10, 1987, before Notary Public James E. Heckel.

2. Regarding the delivery standard discussed in paragraph 3 of my first affidavit, this means delivery is normally completed within 3 days following the day of deposit with the United States Postal Service. For example, a letter deposited on Monday would normally be delivered by Thursday.

3. If a certified letter is mailed to a person's street address (as opposed to a post office box) on a Thursday, and there is a 3 day delivery standard, then the letter would normally be delivered by the following Monday.

4. Likewise, if a certified letter is mailed to a person's street address (as opposed to a post office box) on a Friday, and there is a 3 day delivery standard, then the letter would also normally be delivered by the following Monday.

/s/ A. T. Wolder

Subscribed and sworn to before me a notary public on January 8, 1988.

/s/ illegible

My Commission Expires: Nov. 8, 1993

Supreme Court, U.S.
FILED
JAN 4 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-459

In the Supreme Court of the United States

OCTOBER TERM, 1990

PHYLLIS SCHMIDT AND EARL SCHMIDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA C. BIDDLE
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Attorneys

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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether, when subject matter jurisdiction over petitioner's FTCA suit was challenged by the government, petitioner had the burden of establishing that the district court had jurisdiction.

2. Whether the procedures followed by the FAA in sending a letter denying petitioners' administrative claim constituted a certified mailing within the meaning of 28 U.S.C. 2401(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-459

PHYLLIS SCHMIDT AND EARL SCHMIDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A13-A17) is reported at 901 F.2d 680. The decision of the district court (Pet. App. A8-A11) and the recommendation of the magistrate (*id.* at A3-A7) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1990. A petition for rehearing was denied on June 8, 1990 (Pet. App. A18). The petition for a writ of certiorari was filed on September 6,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Phyllis Schmidt, a flight attendant, was injured in 1983 when the Ozark Airline plane on which she was flying struck a snow removal vehicle after landing in Sioux Falls, South Dakota. Mrs. Schmidt and her husband, petitioner Earl Schmidt, filed a claim for damages with the Federal Aviation Administration on November 1, 1985. In their claim, petitioners alleged that the air traffic controllers in Sioux Falls were negligent in failing to instruct the driver of the snowblower to leave the runway before granting the Ozark flight clearance to land. Pet. App. A14.

The FAA denied petitioners' claim in a letter dated Wednesday, November 19, 1986. Petitioners' attorney signed the receipt for the letter five days later, on Monday, November 24. Petitioners filed their complaint in federal district court, alleging jurisdiction under the Federal Tort Claims Act, on May 21, 1987. Pet. App. A10, A14.

2. The government moved to dismiss petitioners' complaint for lack of subject matter jurisdiction, arguing that it was untimely under 28 U.S.C. 2401(b). Section 2401(b) provides that an action against the United States under the FTCA must be commenced "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." In their opposition to the government's motion, petitioners argued that the letter had been mailed on Friday, November 21, 1986, and that the complaint had been timely filed exactly six months later. Pet. App. A14. Initially, the district court ordered that

the motion would be treated as one for summary judgment and directed the parties to submit affidavits, other evidentiary materials, and briefs. *Id.* at A1-A2. However, the court subsequently clarified its order, indicating that summary judgment procedures were inappropriate in this case; that petitioners had the burden of establishing jurisdiction; and that the court had directed the parties to submit evidentiary materials in order to permit "a proper determination as to whether it has jurisdiction in this matter." *Id.* at A8-A9.

a. The motion was referred to a magistrate. The magistrate found that the letter had been signed on November 19, 1986, and placed in an envelope with a green receipt card attached. Pet. App. A4. The letter, the magistrate further found, was placed on a shelf in the FAA office for pickup by the FAA's private contractor, DDD Company, either on Wednesday, November 19, or Thursday, November 20. After being picked up by DDD, the letter was logged into a DDD log book by name and address on November 20. *Id.* at A5. A DDD Company assistant supervisor testified in a deposition that a United States Postal Service employee "always" picked up mail from DDD Company after 4:15 p.m. each day. *Id.* at A6. The magistrate ruled, nevertheless, that the Post Office's pickup "*might* have been missed on November 20, 1986," and that "it is possible" that a letter received on Monday, November 24, could have been mailed on Friday, November 21. *Ibid.* Concluding that this degree of uncertainty barred a ruling in the government's favor, the magistrate recommended that the government's motion be denied. *Id.* at A6-A7.

b. The district court upheld the government's objection to the magistrate's recommendation and

granted the government's motion to dismiss for lack of subject matter jurisdiction. The court observed that "when the mailing of the letter actually occurred is not clear." Pet. App. A10. The court held, however, that "[w]hen a defendant challenges jurisdiction, the burden is upon the plaintiff of establishing the jurisdictional facts" and that petitioners had not carried that burden because they had failed to show that the letter had not been mailed until November 21. *Ibid.*

3. The court of appeals affirmed. Pet. App. A13-A17. Based upon its review of the evidence, the court observed that the Postal Service "most likely did receive the denial letter on November 20, 1986." *Id.* at A16. In any event, the court continued, petitioners "bore the burden of establishing subject matter jurisdiction once the Government challenged it" and "the evidence fails to establish [petitioners'] contention that the denial letter was not mailed until November 21, 1986." *Ibid.*

The court of appeals also rejected petitioner's claim that, in not obtaining a dated receipt of mailing from the Postal Service, the FAA had failed to comply with the statutory requirement that denial letters be sent by certified mail. Pet. App. A17.[1] The court explained that Postal Service regulations defining certified mail do not require a dated receipt of mailing and that customers sending large quantities of certified mail are allowed to use logbooks, in which they record the number and date of each mailing, as their receipts. *Ibid.*; see Domestic Mail Manual 912.45, at 486

[1] There is no dispute that the FAA received a signed receipt reflecting petitioners' attorney's acceptance of the letter. Pet. App. A10. Petitioners contend that a receipt of mailing, showing the date on which the Postal Service received the item, was also required.

(1987). Since DDD followed those procedures in mailing the letter denying petitioners' claim, the court held that the mailing was by certified mail and thus commenced the running of Section 2401(b)'s period of limitations. Pet. App. A17.

ARGUMENT

1. Petitioners contend that the record gave rise to a material issue of fact, requiring denial of the government's motion, as to the date that their denial letter was mailed—*i.e.*, received by the Postal Service. The court of appeals correctly held that Fed. R. Civ. P. 56 was inapplicable to petitioners' motion, and in any event, petitioners presented no evidence giving rise to a triable issue of fact.

The United States is immune from suit unless it has consented to be sued, *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941), and it may define the terms and conditions upon which it is subject to suit, *Honda* v. *Clark*, 386 U.S. 484, 501 (1967); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In 28 U.S.C. 2401(b), Congress has provided that an FTCA action against the United States must be filed "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the [administrative] claim by the agency to which it was presented." Unless suit is filed within this six-month period, the district court lacks jurisdiction. See *Charlton* v. *United States*, 743 F.2d 557, 558 (7th Cir. 1984).

Under Section 2401(b), petitioners' suit was timely if, and only if, the letter denying their claim was mailed on or after November 21, 1986. Consequently, petitioners bore the burden of establishing that fact. As this Court explained in *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936):

> If [the plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismised, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.

See also *Bingham* v. *Cabot*, 3 U.S. (3 Dall.) 382, 383-384 (1798); *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986).[2]

When jurisdiction is placed in question, the district court should ordinarily determine its power to hear the suit before proceeding to the merits. Thus, unless the issue of jurisdiction is intertwined with the merits, the court should resolve the jurisdictional question, employing whatever procedures are appropriate, before proceeding to trial. See *Crawford* v. *United States*, 796 F.2d 924, 928 (7th Cir. 1986); *Wheeler* v. *Hurdman*, 825 F.2d 257 (10th Cir. 1987). To that end, the court is empowered to call for the submission of evidentiary materials and, if necessary, to conduct a hearing to resolve disputed issues of fact. *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947); *Crawford* v. *United States*, 796 F.2d at 928-

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[2] The cases on which petitioner relies (Pet. 10-11), *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 742 (8th Cir. 1980); *Miller* v. *Central Chinchilla Group, Inc.*, 494 F.2d 414, 417 (8th Cir. 1974), do not contradict these principles. Indeed, the Eighth Circuit has recognized that once jurisdiction is challenged, the burden of establishing jurisdiction is on the plaintiff. *Butts Feed Lots, Inc.* v. *United States*, 690 F.2d 669, 670 (1982). See also *Zunamon* v. *Brown*, 418 F.2d 883, 885-886 (8th Cir. 1969); *Mountaire Feeds, Inc.* v. *Agro Impex, S.A.*, 677 F.2d 651, 653 n.3 (8th Cir. 1982).

929. If a party believes that the motion raises disputed issues of fact, it should request a hearing. *Id.* at 928.

The district court heard and disposed of the government's motion in a manner consistent with these principles. When the government placed subject matter jurisdiction in issue, the district court properly called upon the parties "to submit evidence in order that the Court [might] make a proper determination as to whether it ha[d] jurisdiction in this matter." Pet. App. A9. With the benefit of all evidence submitted by both parties, the court determined that petitioners had "simply failed to establish" the fact necessary to sustain the court's jurisdiction—*i.e.*, that the final denial letter was mailed on or after November 21, 1986. *Id.* at A10.

Contrary to petitioner's contention, the standards for summary judgment motions prescribed by Fed. R. Civ. P. 56 were inapplicable to the motion. The rule that governs motions to dismiss for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), does not provide for the conversion of such motions into summary judgment motions. Further, when (as in this case) the court's jurisdiction turns on facts distinct from the merits, the use of summary judgment procedures would improperly delay the resolution of the jurisdictional issue. See, *e.g.*, *Crawford* v. *United States*, 796 F.2d at 928-929; *Moir* v. *Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990); *Rogers* v. *Stratton Indus., Inc.*, 798 F.2d 913, 915-916 (6th Cir. 1986).[3] Here, the dis-

[3] Statements in some cases suggest that summary judgment procedures may be employed in ruling on motions to dismiss filed under Fed. R. Civ. P. 12(b)(1). See *Crawford* v. *United States*, 796 F.2d at 928 (citing cases that have employed those procedures); *In re Swine Flu Immunization Prods. Liab.*

trict court placed petitioners on notice that they would bear the burden of establishing jurisdiction and that it would finally resolve that question based upon the materials submitted. Petitioners have not suggested that they were deprived of the opportunity to submit any evidence that would have supported their position or that a hearing would have served any practical purpose.[4] Thus, the lower courts were justified in finally deciding the issue of jurisdiction on the basis of the record before them.

In any event, the record in this case did not give rise to a "genuine issue" (Fed. R. Civ. P. 56(c)) as to the date on which the FAA mailed the letter finally denying petitioners' claim. The basic historical facts were not disputed. The government proved the procedure under which the FAA mailed certified letters. Testimony that the Postal Service "always" picked up mail in the late afternoon (see Pet. App.

Litig., 880 F.2d 1439, 1442 (D.C. Cir. 1989). However, there is no conflict among the circuits warranting this Court's review. First, cases that have applied Rule 56 to motions to dismiss for lack of subject matter jurisdiction cannot fairly be read to suggest that a district court lacks authority to employ whatever procedures are appropriate to make a pretrial determination of its jurisdiction or that a court of appeals must review the results of those procedures as though they involve only a motion for summary judgment. Thus, those cases do not cast doubt on the procedures employed here. Second, as we demonstrate, petitioners did not submit evidence giving rise to an issue of fact requiring trial under Rule 56; application of Rule 56 standards would not justify reversing the judgment in this case.

[4] Although the district court initially stated that the government's motion would be treated as one for summary judgment (Pet. App. A1), it subsequently clarified its intention to employ procedures "similar to the handling of a summary judgment motion" to make a final determination of its jurisdiction (*id.* at A9).

A6) justified the conclusion—even in the absence of eyewitness testimony as to this particular mailing—that the letter to petitioners had been picked up on the afternoon of November 20, 1986. See Fed. R. Evid. 406. As the party bearing the burden of proving jurisdiction, petitioners would have had the burden, even under Rule 56, of introducing some evidence from which a trier of fact could have concluded that the letter was not mailed until November 21. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Petitioners failed to do so. They submitted no evidence tending to prove that the FAA's regular procedure had not been followed on November 20, and their attorneys' receipt of the letter on November 24 was just as consistent with its having been mailed on November 20 as on November 21. See Pet. App. A19-A20. A trier of fact could not find for petitioners on the basis of unsupported speculation that regular procedures had not been followed on this particular occasion.

2. Petitioners also suggest that the letter denying their administrative claim was not sent by "certified mail" within the meaning of 28 U.S.C. 2401(b), since the FAA did not obtain an individual receipt of mailing showing the date that the letter was received by the Postal Service. Pet. 13-18; see note 1, *supra*.

As petitioners note, the United States Postal Service Regulations define certified mail as "a service that provides a mailing receipt to the sender and a record of delivery at the office of address." 39 C.F.R. Pt. 3001, Subpt. C, App. A § 5.010. The procedures used by the FAA in sending its denial letter to petitioners were fully consistent with those standards. The agency attached a "green receipt card" that "indicate[d] that the letter was to be sent by certified mail" and which was later "signed by [petitioners']

attorney when the letter was received." Pet. App. A9-A10. That receipt provided "a record of delivery at the office of address." As the court of appeals noted, an individual receipt of mailing is not required for certified mail. When three or more letters are mailed at one time, the Domestic Mail Manual allows senders to use a "mailing book" furnished by the Post Office (Postal Service Form 3877) to create the requisite receipt of mailing. See Domestic Mail Manual 912.45, at 486 (1987).[5] The entry in DDD's logbook for the denial letter constituted a mailing receipt for purposes of the Postal Service's definition of certified mail. The procedures used to send FAA's denial letter satisfied the Postal Service definition of "certified mail"; there is no basis for construing 28 U.S.C. 2401(b) to require any different procedure.

Petitioners provide no support for their contention (Pet. 14-15) that Section 2401(b) should be construed to require a mailing receipt showing the date that an article was received by the Postal Service. Nothing in the Postal Service's definition of "certified mail" supports such a requirement. To the contrary, postal regulations regarding certified mail provide that a receipt showing the date of mailing is optional:

> *If requested by the mailer*, the time of acceptance by the Postal Service will be indicated on the receipt.

39 C.F.R. Pt. 3001, Subpt. C, App. A § 5.021 (emphasis added).[6]

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[5] The Postal Service has incorporated the Domestic Mail Manual by reference in its regulations. See 39 C.F.R. 111.1.

[6] See also Domestic Mail Manual 912.44*d* (procedures to be followed if the sender desires a postmarked mailing receipt);

As petitioners concede, their contention raises an issue "of first impression" on which there is no conflict among the courts of appeals. Pet. 13. Moreover, the decisions on which petitioners rely are inapposite. In *Lindemood* v. *Commissioner of Internal Revenue*, 566 F.2d 646 (9th Cir. 1977), a case that petitioners characterize as involving "[a] similar situation" (Pet. 14), the Ninth Circuit had no occasion to address the definition of certified mail. Rather, the court applied a statute, 26 U.S.C. 7502, and detailed Treasury Department regulations regarding proof of the date of filing of petitions for redeterminations of tax deficiencies with the Tax Court. 566 F.2d at 647-649. Those regulations and that statute are irrelevant to this case. In *Johnson* v. *United States*, 652 F. Supp. 407 (E.D. Va. 1987), the government sent a denial letter by first-class mail (without even attempting to use registered or certified mail) and thus clearly failed to meet the requirements of 28 U.S.C. 2401(b). And in *Miller* v. *United States*, 741 F.2d 148 (7th Cir. 1984), the court concluded that a letter sent by the agency was not a final denial of the plaintiff's claim. There is no similar issue here.

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id. at 912.44*e* (procedures to be followed if a postmarked receipt is not desired).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 292061 20281